

1 McDONALD CARANO WILSON LLP
 2 Ryan J. Works, Esq. (NV Bar No. 9224)
 3 Amanda M. Perach, Esq. (NV Bar No. 12399)
 4 2300 West Sahara Avenue, Suite 1000
 5 Las Vegas, Nevada 89102
 6 Telephone Number: (702) 873-4100
 7 Facsimile Number: (702) 873-9966
 8 rworks@mcdonaldcarano.com
 9 aperach@mcdonaldcarano.com
 10 *Proposed Counsel for TEM Enterprises*

Electronically Filed June 19, 2014

7 **UNITED STATES BANKRUPTCY COURT**
 8 **DISTRICT OF NEVADA**

9 In re	Case No.: 14-13955-abl
10 TEM ENTERPRISES,	Chapter 11
11 Debtor in Possession.	MOTION TO ASSUME AND CURE EXECUTORY CONTRACT
12	Hearing Date: July 23, 2014 Hearing Time: 1:30 p.m.
13	Hearing Place: Foley Federal Building, 300 Las Vegas Blvd. South, Las Vegas, Nevada 89101

18 TEM ENTERPRISES d/b/a/ XTRA AIRWAYS (“Debtor” or “Debtor in Possession”),
 19 in the above-captioned case (the “Chapter 11 Case”), hereby files this motion for an order
 20 authorizing the cure and assumption of an executory contract by and between the Debtor and
 21 Accountemps (the “Agreement”) pursuant to 11 U.S.C. § 365 (the “Motion”). As discussed
 22 more fully below, the assumption of the Agreement is critical to the ultimate success of the
 23 Debtor.

24 **I. JURISDICTION**

25 1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and
 26 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)
 27 2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
 28 3. The statutory basis for the relief requested herein is 11 U.S.C. § 365.

1 4. Pursuant to Local Rule 9014.2, Debtor consents to entry of final order(s) or
 2 judgment(s) by the bankruptcy judge if it is determined that the bankruptcy judge, absent
 3 consent of the parties, cannot enter final orders for judgment consistent with Article III of the
 4 United States Constitution.

5 **II. BACKGROUND**

6 1. On June 4, 2014 (the “Petition Date”), Debtor filed a voluntary petition for relief
 7 under Chapter 11 of Title 11, United States Bankruptcy Code (the “Bankruptcy Code”).
 8 [Docket No. 1].

9 2. The Debtor is continuing in possession of its property and is operating and
 10 managing its businesses, as debtor in possession, pursuant to sections 1107 and 1108 of the
 11 Bankruptcy Code.

12 3. No request has been made for the appointment of a trustee or examiner, and
 13 statutory committee has been appointed.

14 4. Prior to the Petition Date, the Debtor began its efforts to attempt to restructure
 15 the company outside of bankruptcy. Dunn Decl. at ¶ 4. Pursuant to this goal, the Debtor sought
 16 out an experienced chief financial officer who could aid in the reorganization of the Debtor and
 17 its finances. *Id.* In particular, the Debtor sought someone who could aid in the Debtor’s
 18 restructuring efforts and assume the roles of chief financial officer, controller and treasurer. *Id.*
 19 The Debtor sought someone who could fill the roles of multiple employees while only
 20 compensating one person for such services. *Id.*

21 5. On May 12, 2014, the Debtor and Accountemps entered into an Agreement
 22 which provided for the temporary employment of Robert Godfrey (“Godfrey”) as the chief
 23 financial officer (the “CFO”) of the Debtor. A true and correct copy of the Agreement is
 24 attached to the Dunn Decl. as “**Exhibit 1.**” The Debtor selected Godfrey because of his vast
 25 experience in company restructuring and in acting as the CFO, controller or executive for other
 26 similarly-situated companies. A true and accurate copy of Godfrey’s resume (the “Godfrey
 27 Resume”) is attached to the Dunn Decl. as “**Exhibit 2**”. Based on his substantial expertise in a
 28 wide range of roles, the Debtor selected Godfrey to fill its CFO position and to take on the

1 duties of the Debtor's controller and treasurer. *Id*; *see also* Dunn Decl. at ¶ 5.

2 6. Pursuant to the Agreement, the Debtor agreed to pay \$64.78 to Accountemps per
3 hour of work performed by Godfrey. *See* Agreement (Ex. 1) at 1. The Agreement also required
4 compensation in the amount of 1.5 times the hourly rate for overtime work. *Id.* at 3. Godfrey is
5 then paid by Accountemps based upon a separate arrangement between him and the agency. *Id.*

6 7. On or around May 16, 2014, the first payment in the amount of \$2,695.17 to
7 Accountemps came due. Dunn Decl. at ¶ 6. Due to the Debtor's bankruptcy filing, its first
8 payment to Accountemps was not honored by the bank. *Id.* Since then and up to the Petition
9 Date, the Debtor has accrued an additional \$7,581.86 in fees due and owing to Accountemps.
10 *Id.* As such, as of the Petition Date, the Debtor owes Accountemps a total of \$10,277.03 for the
11 work performed by Godfrey prior to bankruptcy. *Id.*

12 8. Pursuant to the Agreement, "invoices are due upon receipt." *See* Agreement
13 (Ex. 1) at 3. Furthermore, the Agreement requires the Debtor to pay all "costs of collection,
14 including reasonable attorneys' fees, whether or not legal action is initiated. Additionally, [it]
15 may, at [its] option, charge interest on any overdue amounts at a rate of the lesser of 1 ½% per
16 month or the highest rate allowed by applicable law from the date the amount first became
17 due." *Id.*

18 9. Following Debtor's failure to pay, Accountemps stated that it would not allow
19 for the continued services of Godfrey unless it was paid in full. Dunn Decl. at ¶ 7. In order to
20 ensure that Godfrey's services continue, in aid of the Debtor's bankruptcy, the Debtor and
21 Accountemps agreed that, contingent upon the Court's approval, Debtor would tender the pre-
22 petition amount due to Accountemps (\$10,277.03), excluding interest and fees, to cure and
23 assume the Agreement post-petition. *Id.* This is absolutely necessary during this critical stage
24 of the Debtor's Chapter 11 Case.

25 10. As such, Debtor hereby requests that the Motion be granted in its entirety to
26 allow the Debtor to continue to utilize Godfrey's services as CFO which are vital to the initial
27 filings required by the Bankruptcy Code, continued assistance to counsel in negotiating
28 budgets, use of cash collateral, monthly operating reports, and other financial matters that are

1 central to the Chapter 11 Case and any chance of a successful reorganization.

2 **III. LEGAL ARGUMENT**

3 Section 365(a) of the Bankruptcy Code permits the Debtor to assume or reject any
 4 executory contract or unexpired lease of the Debtor. 11 U.S.C. §365(a). In order to assume an
 5 executory contract which is in default, the Debtor must cure such default or provide adequate
 6 assurance of a prompt cure. 11 U.S.C. §365(b)(1)(A).

7 The decision to assume an executory contract is a matter of business judgment requiring
 8 only a summary review by the court. *In re G.I. Industries, Inc.*, 204 F.3d 1276, 1282 (9th Cir.
 9 2000) (“A bankruptcy court’s hearing on a motion to reject is a summary proceeding that
 10 involves only a cursory review of a trustee’s decision to reject the contract. Specifically, a
 11 bankruptcy court applies the business judgment rule to evaluate a trustee’s rejection
 12 decision...”); *Orion Pictures Corp. v. Showtime Networks (In re Orion Pictures Corp.)* 4 F. 3d.
 13 1095, 1099 (2d Cir. 1993) *cert. denied*, 511 U.S. 1026 (1994). Under the business judgment
 14 test, a court should approve a debtor’s proposed disposition of a contract if it is beneficial to the
 15 estate. *In re Food Barn Stores, Inc.*, 107 F.3d 558, 567 (8th Cir. 1997) (business judgment test
 16 in deciding whether to approve a trustee’s motion to assume, reject, or assign an unexpired
 17 lease or executory contract entails a determination that the transaction is in the best interest of
 18 the estate); *Commercial Finance Ltd. v. Hawaii Dimensions, Inc.*, 47 B.R. 425, 427 (D. Haw.
 19 1985).

20 Here, there is no question that the cure and assumption of the Agreement is in the best
 21 interest of the estate and satisfies the business judgment test. The Agreement provides for the
 22 employment of a CFO who is well-versed in the background of the Debtor and who brings a
 23 wealth of experience to the table. For example, Godfrey has extensive experience in (1)
 24 building financial projection models used to solicit debt and equity financing and to acquire and
 25 sell companies and financial assets; (2) performing and providing due diligence associated with
 26 mergers and acquisitions (M&A); (3) conducting M&A and other contract negotiations; and (4)
 27 aiding in the process of corporate formation and dissolution. *See generally* Resume (Ex. 2). In
 28 complex reorganizations, such as this, the presence of a qualified CFO is essential to the

1 company's ability to successfully reorganize.

2 On the other hand, it would be contrary to the interests of the estate to terminate
 3 Godfrey as the CFO because, absent his employment, the Debtor would be forced to hire
 4 multiple people to fill his role without expending the time and money on marketing efforts to
 5 locate qualified candidates. Additionally, Godfrey has been working on behalf of the Debtor
 6 for purposes of assisting Debtor's proposed counsel and has already learned the background and
 7 financial condition of the Debtor and thus the hiring of another CFO, controller and treasurer
 8 would duplicate such efforts without any beneficial return. If this Motion is denied, the Debtor
 9 will have lost several weeks of gained knowledge on behalf of Godfrey, including his work
 10 preparing the financial aspects of the Debtor's first-day filings, cash collateral stipulation,
 11 budget, and other matters that are purely within the province of the CFO, controller and
 12 treasurer.

13 Finally, the hourly fee charged for Godfrey's services is consistent with the
 14 compensation paid to other qualified CFOs¹ in the Debtor's industry especially given that
 15 Godfrey performs the roles of CFO, controller and treasurer while using his experience to aid in
 16 this complex restructuring effort. Dunn Decl. at ¶ 8. Allowing for the cure and assumption of
 17 the Agreement would only serve to benefit the estate and substantially improve the likelihood
 18 of the Debtor successfully reorganizing.

19 **IV. CONCLUSION**

20 Based on the foregoing, Debtor respectfully requests that its Motion be granted and that
 21 it be permitted to cure and assume the Agreement to allow the CFO, Robert Godfrey, to
 22 continue to provide services to the Debtor, pursuant to the Agreement.

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 28 ¹ Indeed, the Debtor's previous CFO earned a salary of \$100,000.00 per year plus benefits.
 Dunn Decl. at ¶ 8.

1 DATED this 19th day of June, 2014.

2 MCDONALD CARANO WILSON LLP

3 By: /s/ Ryan J. Works
4 RYAN J. WORKS (NV Bar No. 9224)
5 AMANDA M. PERACH (NV Bar No. 12399)
6 2300 West Sahara Avenue, Suite 1000
7 Las Vegas, Nevada 89102
8 Telephone: (702) 873-4100
9 Facsimile: (702) 873-9966
10 rworks@mcdonaldcarano.com
11 aperach@mcdonaldcarano.com
12 *Proposed Counsel for TEM Enterprises*